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IN THE

Supreme Court of the United States

OCTOBER TERM, 1939

No. 1041 102

THE ATLANTIC REFINING COMPANY,
Petitioner,

v.

JAMES B. BERRY SONS COMPANY, INC.,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

and

BRIEF IN SUPPORT THEREOF.

THEODORE S. KENYON,
ROY W. JOHNS,
EDGAR F. BAUMGARTNER,
Counsel for Petitioner.

Post Printing Company, Inc., 80 Lafayette Street, New York, N. Y.

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TO THE HONORABLE CHARLES EVANS HUGHES, CHIEF JUSTICE, AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Your Petitioner, The Atlantic Refining Company, a corporation of Pennsylvania, respectfully prays that a Writ of Certiorari issue to the United States Circuit Court of Appeals for the Third Circuit to review a decision and order of that court entered February 28, 1940 denying a petition to vacate and set aside a void order of that court entered September 27, 1939.

A transcript of the Record in this case, including the proceedings in said Circuit Court of Appeals, is filed herewith in accordance with Rule 28 of this court.

Questions Presented.

1. Where a Circuit Court of Appeals has entered an order reversing the judgment of the court below and subsequently, on a rehearing, is equally divided, one judge filing an opinion that its former order should be reversed, the second judge simultaneously filing an opinion that it should be sustained and the third judge being then dead, can the court, thus equally divided, enter a lawful order reversing its former order?

2. Where the judges of the court are equally divided on a rehearing, can an order thereon, pursuant to the decision of one judge, and purporting to reverse the previous order of the court, be made legally effective by the fact that the other judge, who dissents from the decision, joins in authorizing the entry of that order?

The questions presented appear never to have been decided by this Court. They involve no issues of fact but solely of law.

Summary and Short Statement of Matters Involved.

In the above entitled suit in equity brought by Petitioner against Respondent in the United States District Court for the Western District of Pennsylvania, the District Court entered a decree dismissing the Bill of Complaint (R. 635).

On appeal the Circuit Court of Appeals for the Third Circuit (Biggs and Buffington, Circuit Judges, and Dickinson, District Judge, sitting), rendered and filed on December 21, 1937 a unanimous opinion of said three Judges reversing the decree appealed from (R. 660b). On rehearing the same three Judges rendered and filed on December 21, 1938 a second unanimous opinion stating that the court "finds no reason to differ from its former holding", and that "After rehearing and full consideration we are con-

firmed in our prior conclusion" (R. 660v). Thereupon, on December 21, 1938, the court entered its order adjudging "that the decree of the said District Court in this cause be, and the same is hereby reversed" (R. 660dd). Thereafter, on May 10, 1939, the appeal was argued on second rehearing.

Judge Dickinson died on or about September 16, 1939.

Thereafter, on September 27, 1939, there were rendered and filed, "Sur Second Rehearing", two conflicting opinions: (1) an opinion per "Biggs, Circuit Judge" (R. 660nn), which concludes as follows:

> "We therefore reverse our former conclusions and hold that the claims *sub judice* are invalid for want of invention.
>
> Accordingly, the decree of the court is affirmed."

and then follows the statement:

> "*Judge Dickinson participated in this decision."

and (2) an opinion per "Buffington, J." (R. 660eee) which contains the following:

> "I have seen no reason in these protracted hearings and rehearings to differ from the facts and reasoning then stated [in the previous decisions of the court]. * * * Such being my unchanged view, I am constrained to file this respectful but earnest dissent."

There was entered on September 27, 1939 a purported order of said Circuit Court of Appeals signed "John Biggs, Jr., Circuit Judge" (R. 660lll), providing that

> "the Decree of the said District Court in this cause be, and the same is hereby affirmed, with costs."

This purported order, reversing the earlier decree of the Circuit Court of Appeals (R. 660dd), was void and of

no legal effect, we submit, because of the extraordinary circumstances under which it was entered, and which were made known by the *per curiam* opinion on petition to vacate, referred to below.

After Petition to this Court for Writ of Certiorari on the sole question of the validity of the patent in suit had been filed and denied (308 U. S. 623), the Clerk of said Circuit Court of Appeals on January 8, 1940 issued a purported mandate to the District Court based upon said purported order of September 27, 1939.

Petitioner, on January 27, 1940, brought this proceeding, entitled in the same cause, by petitioning the said Circuit Court of Appeals to vacate said purported order as being void in law, and to recall its said purported mandate, and to issue instead its mandate in conformity with said unanimous opinions and order of December 21, 1938; or, in the alternative, to set the case for rehearing (R. pp. 660nnn-660rrr).

On February 28, 1940, a *per curiam* opinion "Before Biggs and Buffington, Circuit Judges" (R. p. 660rrr), was filed by said Circuit Court of Appeals stating that its order of September 27, 1939

> "was the order of this court since Judge Buffington joined in authorizing its entry.
> Accordingly the Petition for Rehearing is denied."

On the same day said Circuit Court of Appeals entered an order signed by Circuit Judges Biggs and Buffington (R. p. 660sss) that

> "the petition for rehearing in the above entitled case is hereby denied."

From the *per curiam* opinion quoted, it now appears that the Circuit Court of Appeals did not choose to rely on any *post mortem* effect of Judge Dickinson's participation in the case to support the purported order of September 27,

1939, but attempted to justify its position on the stated ground that Judge Buffington, while dissenting to the reversal, joined in authorizing the entry of the order which purports to effectuate it.

Reasons Relied Upon for the Allowance of the Writ.

The action of the court below in refusing to vacate the purported order of September 27, 1939, which order is not based upon the judgment of the court because it is contrary to the judgment of one of the two judges constituting the court, has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

WHEREFORE, it is respectfully submitted that this Petition should be granted.

Respectfully submitted,

THEODORE S. KENYON,
ROY W. JOHNS,
EDGAR F. BAUMGARTNER,
Counsel for Petitioner.

Dated, New York, N. Y., May 24, 1940.

I hereby certify that, in my opinion, the foregoing petition for writ of certiorari is well founded in point of law. It is not filed for delay.

THEODORE S. KENYON,
Of Counsel.